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MPAO

Memorandum of Points and Authorities in Oppo
1981840



SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**FACEBOOK, INC.'S OPPOSITION TO
SIX4THREE, LLC'S STATEMENT OF
DISQUALIFICATION**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015

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1 **I. INTRODUCTION**

2 Following its admitted leak of Facebook’s confidential information last November, Six4Three has
3 successfully prevented Facebook and the Court from conducting an inquiry into its conduct for the past
4 nine months through deliberate delay tactics. And with discovery blocked, Facebook’s confidential
5 information continues to be leaked publicly, most recently last month. Six4Three’s unauthorized Second
6 Section 170.3 Disqualification Statement is just the latest play in this strategy. This Court is authorized
7 by statute to turn away Six4Three’s latest frivolous attempt at disqualification. There are at least three
8 independent statutory bases to strike Six4Three’s Second Section 170.3 Disqualification Statement now.
9 This Court should do so as soon as possible so that Six4Three does not further delay this case with yet
10 another bad-faith filing.

11 **First**, Code of Civil Procedure Section 170.4(c)(3) bars Six4Three’s Second Section 170.3
12 Disqualification Statement. “A party may file no more than one statement of disqualification against a
13 judge unless facts suggesting new grounds for disqualification are first learned of or arise after the first
14 statement of disqualification was filed.” Cal. Civ. Proc. Code § 170.4(c)(3). Six4Three already filed a
15 Section 170.3 disqualification challenge on July 12, 2019, and its Second Section 170.3 Disqualification
16 Statement contains no facts that were “first learned of or ar[o]se after” July 12, 2019. Indeed, at the last
17 hearing, held on August 7, 2019, the Court asked Six4Three to identify any new facts, and Six4Three had
18 none. The best it could do was to argue that the Court ordered full-scope representation following the
19 last hearing, when, in fact, the Court had already done that in June.

20 **Second**, Code of Civil Procedure Section 170.3(c)(1) requires a disqualification statement to “be
21 presented at the earliest practicable opportunity after discovery of the facts constituting the ground for
22 disqualification.” Six4Three sat on the facts that it argues constitute grounds for disqualification for
23 months, and so waived its right to make a disqualification challenge based on those facts. The
24 gamesmanship could not be more obvious: Six4Three waited to file this latest challenge until its Section
25 170.6 challenge was rejected not only by this Court, but also by the California Court of Appeal and
26 Supreme Court, and its first Section 170.3 statement was struck by this Court.

27 **Third**, Code of Civil Procedure Section 170.4(b) empowers “the trial judge against whom” a
28 disqualification challenge was filed to “order it stricken” if it is untimely or “if on its face it discloses no

1 legal grounds for disqualification.” Six4Three’s second challenge does not disclose any legal grounds
2 for disqualification, and instead relies heavily on statements by the Court that are statutorily permitted.
3 The core of Six4Three’s arguments is that the Court commented regarding the ongoing proceedings, but
4 “[i]t shall not be grounds for disqualification that the judge . . . [h]as in any capacity expressed a view on
5 a legal or factual issue presented in the proceeding.” Cal. Civ. Proc. Code § 170.2(b).

6 At this point, given that Six4Three’s First Section 170.3 Disqualification Statement was quickly
7 stricken for presenting “improper grounds for seeking disqualification,” and its Second Section 170.3
8 Disqualification Statement is untimely on its face, there should no longer be any question that Six4Three
9 is filing these challenges to delay discovery into its obvious misconduct. Six4Three filed its Second
10 Section 170.3 Statement *the night before* this Court was able (finally) to rule on Facebook’s right to
11 conduct discovery relating to its forthcoming motion for sanctions. This should end now: the Court
12 should strike Six4Three’s Second Section 170.3 Disqualification Statement and issue an order to show
13 cause why sanctions should not issue for this blatant attempt to delay and avoid the Court’s discovery
14 order.

15 **II. FACTUAL AND PROCEDURAL BACKGROUND**

16 **A. Six4Three’s Multiple Section 170.3 Disqualification Statements Are Based on Its** 17 **Dissatisfaction With This Court’s Rulings.**

18 More than a year and a half ago, Judge V. Raymond Swope was assigned to this case for all
19 purposes. Order Accepting Peremptory Challenge & Reassigning Judge at 2 (Jan. 29, 2018). It is, of
20 course, not the Court’s fault that Six4Three abused multiple rules and violated multiple Court orders
21 thereafter. The problems here began when Six4Three improperly appended hundreds of documents to its
22 opposition to Facebook’s Anti-SLAPP motion. As the Court recognized, that was improper as a matter
23 of well-established rules and case law. Amended Sealing Order at 10–12 (Nov. 1, 2018).

24 In late 2018, Six4Three’s disregard for rules, cases, and orders escalated. Six4Three, its principal
25 Mr. Kramer, and its former legal team (Birnbaum & Godkin, LLP (“Birnbaum & Godkin”), Gross &
26 Klein LLP (“Gross & Klein”), and Mr. Scaramellino) orchestrated the disclosure of Facebook’s
27 confidential and highly confidential documents. *See generally* Order re Def.’s Mot. to Open Disc. & to
28 Compel (Mar. 15, 2019) (“March 15 Order”). Facebook thus moved for discovery into the violations to

stem the ongoing disclosure of documents. In a carefully reasoned decision citing dozens of documents, the Court found a prima facie showing sufficient to apply the crime-fraud exception and ordered discovery. March 15 Order at 7–10, 13.

B. Six4Three Is Causing Delay Without a Legal Basis for Doing So.

Six4Three, its past counsel, and its new counsel have needlessly delayed the case for months.

Six4Three’s former counsel, Birnbaum & Godkin and Gross & Klein, sought to distance themselves from the fallout. They notified Six4Three of their intent to withdraw as early as November 30, 2018, and the Court granted their motions to withdraw on April 30, 2019. Hr’g Tr. at 19:6–21, 37:9–11 (Nov. 30, 2018); Orders Granting Attorney’s Mot. to Be Relieved as Counsel at 1–2 (Apr. 30, 2019).

After Six4Three’s former counsel withdrew, Six4Three did not find full-scope counsel (and still has not done so). Instead, it hired limited-scope counsel, Macdonald Fernandez LLP (“Macdonald Fernandez”). Notice of Limited Scope Representation at 1 (July 2, 2019). Macdonald Fernandez then filed a peremptory challenge seeking to disqualify Judge Swope under Code of Civil Procedure Section 170.6. Request for Peremptory Challenge (July 3, 2019). The Court struck this challenge as untimely and procedurally improper, because under Section 170.6(a)(2), any Section 170.6 peremptory challenge should have been made in February 2018—more than a year ago. Order Striking Peremptory Challenge at 2 (July 9, 2019). Six4Three then tried again to disqualify Judge Swope by making a statement of disqualification pursuant to Code of Civil Procedure Section 170.3(c)(1) on July 12, 2019. Verified Statement of Disqualification (July 12, 2019). Six4Three made its disqualification statement only on the basis that the Court erred in striking its Section 170.6 peremptory challenge as untimely. *Id.* ¶¶ 2–3. The Court struck Six4Three’s disqualification statement as substantively and procedurally deficient. “[D]issatisfaction with the judge’s rulings” is an insufficient basis for disqualification, and Six4Three failed to serve the disqualification statement on Judge Swope as required by Section 170.3(c)(1). Order Striking Macdonald Fernandez’s Verified Statement of Disqualification at 1–2 (July 19, 2019) (quoting CJER, Cal. Benchguide: Disqualification of Judge (Revised 2010) § 2:25). Six4Three then petitioned for writ relief to the Court of Appeal, which rejected its petition in one day. Petition for Writ of Mandate (July 18, 2019); Order Denying Petition (Cal. Ct. App. July 19, 2019). Six4Three petitioned the California Supreme Court for review, and that Court also summarily rejected the petition. Petition for

1 Review (July 29, 2019); Order Denying Petition for Review (Cal. Aug. 2, 2019).

2 After this Court, the Court of Appeal, and the California Supreme Court all rejected Six4Three's
3 belated attempt to disqualify Judge Swope, Six4Three filed *another* disqualification attempt on August 7,
4 the day before the parties were scheduled to have a case management conference and a hearing on the
5 parties' briefing regarding discovery and a schedule for a motion for sanctions. Mem. P. & A. in Supp.
6 of Six4Three's Obj. to Hearing on Grounds of Disqual. (Aug. 6, 2019) ("Disqual. Mem."); Order re
7 Retention of Counsel (Aug. 1, 2019) ("Aug. 1 Counsel Retention Order"). Six4Three submitted a
8 declaration from its counsel Matthew Olson, which states that Six4Three seeks to disqualify Judge
9 Swope under California Code of Civil Procedure Sections 170.1 and 170.3, and that the basis for the
10 disqualification is (1) for the reasons stated in Six4Three's accompanying memorandum of points and
11 authorities, and (2) because Judge Swope has "made comments in court over the course of several
12 hearings" Decl. of Matthew J. Olson ¶ 3 (Aug. 6, 2019) ("Olson Decl."). The reasons set forth in
13 Six4Three's brief (but not verified in the Olson Declaration) are that the Court (1) made comments at
14 hearings on November 30, 2018, March 13, 2019, March 15, 2019, and May 10, 2019 that Six4Three
15 alleges demonstrate bias; (2) required Six4Three to retain full-scope counsel in the written order issued
16 on August 1, 2019; and (3) has not sanctioned Facebook for events occurring in September 2018 and
17 December 2018. Disqual. Mem. at 8–18.

18 **III. THIS COURT SHOULD STRIKE SIX4THREE'S SECOND SECTION 170.3**
19 **STATEMENT OF DISQUALIFICATION.**

20 Six4Three's Second Section 170.3 Disqualification Statement is fatally flawed in at least three
21 ways: (1) it is barred by the prohibition on making multiple statements of disqualification where no new
22 grounds for disqualification arise after the first statement, (2) it is untimely, and (3) it discloses no legal
23 grounds for disqualification.

24 **A. This Court Should Decide These Matters.**

25 This Court is authorized to strike the motion for any of these reasons. Sections 170.4(b) and
26 170.4(c)(3) explicitly empower "*the trial judge against whom it [the challenge] was filed*" to strike
27 follow-on statements of disqualification where no new facts are learned after the first statement was filed,
28 that are untimely, or that disclose no legal grounds for disqualification. Cal. Civ. Proc. Code §§

1 170.4(b), 170.4(c)(3). Because Six4Three's Second Statement of Disqualification fails on each of those
2 grounds, this Court has the authority to strike it, and need not answer the allegations in Six4Three's
3 disqualification challenge or have another judge determine the question of disqualification. Cal. Civ.
4 Proc. Code §§ 170.4(b), 170.4(c)(3).

5 **B. Section 170.4(c)(3) Bars Six4Three's Second Statement of Disqualification.**

6 "A party may file no more than *one* statement of disqualification against a judge unless facts
7 suggesting new grounds for disqualification are first learned of or arise *after* the first statement of
8 disqualification was filed." Cal. Civ. Proc. Code § 170.4(c)(3) (emphasis added). If a party makes two
9 disqualification challenges, and the second challenge contains facts that were not included in the first, the
10 Court must still strike the second disqualification challenge under Section 170.4(c)(3) if the additional
11 facts "were known before the filing of the first statement of disqualification." *Sweis v. Sequoyah Heights*
12 *Homeowners Ass'n*, No. 2001-018602, 2005 WL 5268522 (Cal. Super. Ct. Apr. 6, 2005); *see also Di*
13 *Flores v EHG*, No. BC068651, 2000 WL 35565589 (Cal. Super. Ct. June 12, 2000) (striking a
14 disqualification statement under Section 170.4(b)(3) where the statement added new grounds for
15 disqualification relating to the court's orders, but was "repetitive of grounds raised in previous
16 statements").

17 The Court should strike Six4Three's Second Statement of Disqualification because it does not
18 rely on any facts that were "first learned of or ar[o]se after" Six4Three's first disqualification challenge.
19 All of the facts underlying Six4Three's Second Statement of Disqualification were already known when
20 Six4Three made its first challenge under Code of Civil Procedure Section 170.3(c)(1) on July 12, 2019.
21 Verified Statement of Disqualification (July 12, 2019). Six4Three argues that the Court should be
22 disqualified because it (1) made comments at hearings on November 30, 2018, March 13, 2019, March
23 15, 2019, and May 10, 2019 that Six4Three alleges demonstrate bias; (2) required Six4Three to retain
24 full-scope counsel in the written order issued on August 1, 2019; and (3) has not sanctioned Facebook for
25 events occurring in September 2018 and December 2018. Disqual. Mem. at 8–18. Grounds 1 and 3
26 "were known before the filing of the first statement of disqualification," since those events occurred
27 months before July 12, 2019. *Sweis*, 2005 WL 5268522. Ground 2 was also known before the filing of
28 the first statement of disqualification, because the Court ordered Six4Three to find representation over a

1 month before its first statement of disqualification.¹ The Court ordered Mr. Kramer, Six4Three's
2 principal, to retain counsel to fully represent Six4Three at a hearing on June 7, 2019. *See* Hr'g Tr. at
3 8:8–10, 15:3–10 (June 7, 2019) (ordering Mr. Kramer “to retain counsel so that you can defend against
4 *any* actions that may be pursued by Facebook” by June 28, 2019) (emphasis added). Six4Three cannot
5 argue that it did not know about this order—Mr. Kramer attended the June 7, 2019 hearing by phone and
6 stated that he understood the Court's order. *Id.* at 2:22–5:6. The Court memorialized this instruction in a
7 written order entered on June 19, 2019. Order re Retention of Counsel ¶ 2 (June 19, 2019) (“June 19
8 Counsel Retention Order”) (“Six4Three shall retain counsel no later than 5:00 p.m. PDT on June 28,
9 2019.”). At a case management conference on July 19, 2019, the Court reminded Six4Three that it had
10 already ordered Six4Three to “obtain counsel to generally represent the corporation so that we could
11 move forward.” Hr'g Tr. at 15:15–18 (July 19, 2019). Because Six4Three had not complied with the
12 order, the Court repeated its order yet again in the written order entered on August 1, 2019. Aug. 1
13 Counsel Retention Order. The fact that Six4Three needed full-scope representation was known “before
14 the filing of the first statement of disqualification,” *Sweis*, 2005 WL 5268522, and was not “first learned
15 of” and did not “arise after the first statement of disqualification was filed” on July 12, 2019. Cal. Civ.
16 Proc. Code § 170.4(c)(3). This Court, as “the judge against whom” the serial disqualification statements
17 were filed, should strike Six4Three's Second Disqualification Statement under Section 170.4(c)(3).

18 **C. Six4Three's Second Disqualification Statement Is Untimely Under Section**
19 **170.3(c)(1).**

20 Code of Civil Procedure Section 170.3(c)(1) provides that the statement of disqualification “shall
21 be presented at the earliest practical opportunity after discovery of the facts constituting the grounds for
22 disqualification.” “[I]f a statement of disqualification is untimely filed . . . the trial judge against whom it
23 was filed may order it stricken.” Cal. Civ. Proc. Code § 170.4(b). Section 170.3(c)(1)'s “strict
24 promptness requirement is not to be taken lightly, as a failure to comply constitutes forfeiture or an
25 implied waiver of the disqualification.” *Tri Cty. Bank v. Superior Court*, 167 Cal. App. 4th 1332, 1337

26
27 ¹ Even if the Court had not already ordered Six4Three to retain full-scope counsel, an order directing a
28 limited liability company—an entity that cannot represent itself in court—to find counsel is not a valid
basis for disqualifying a judge.

1 (2008) (citing *In re Steven O.*, 229 Cal. App. 3d 46, 54–55 (1991)).

2 The purpose of the requirement that alleged grounds for disqualification be
3 asserted at the earliest practicable opportunity is that “[i]t would seem ...
4 intolerable to permit a party to play fast and loose with the administration
5 of justice by deliberately standing by without making an objection of which
6 he is aware and thereby permitting the proceedings to go to a conclusion
7 which he may acquiesce in, if favorable, and which he may avoid, if not.”

8 *Id.* at 1337 (quoting *People v. Scott*, 15 Cal.4th 1188, 1207 (1997)). A delay of “nearly one month”
9 makes a disqualification challenge untimely. *Magana v. Superior Court*, 22 Cal. App. 5th 840,
10 856, *reh’g denied* (May 24, 2018), *review denied* (Aug. 15, 2018). A delay of twenty-three days can
11 make a statement of disqualification “very untimely,” and a delay of just eight days is still untimely.
12 *Gonzalez v. The Mony Grp.*, No. BC229923, 2001 WL 36013138 (Cal. Super. Ct. July 2, 2001) (striking
13 a statement of disqualification as untimely when it related to statements made by the judge twenty-three
14 days and eight days before the statement was filed, even where plaintiff had filed (and the court had
15 denied) a peremptory challenge under section 170.6 in the interim). The promptness requirement applies
16 even where a stay is in place, because a “statement of objection” can be filed “even while the stay [is] in
17 effect.” *Tri Ctys. Bank*, 167 Cal. App. 4th at 1338.

18 The Court should strike Six4Three’s Second Disqualification Statement as untimely under
19 Section 170.3(c)(1) because Six4Three did not present it “at the earliest practical opportunity after
20 discovery of the facts constituting the ground for disqualification.” Cal. Civ. Proc. Code § 170.3(c)(1).
21 A delay of just eight days rendered a disqualification challenge untimely in *Gonzalez*, and a delay of
22 twenty-three days was “very untimely.” *Gonzalez*, 2001 WL 36013138. Six4Three bases its
23 disqualification challenge on comments made in November 2018, March 2019, and May 2019; an order
24 to retain counsel that was made in June 2019; and the absence of sanctions for events occurring in
25 September 2018 and December 2018. These events occurred two to ten months before Six4Three’s
26 second disqualification challenge—far more than the eight days that were found untimely, and grounds
27 for striking, in *Gonzalez*.

28 By continuing to participate in this case’s proceedings rather than making a disqualification
challenge “at the earliest practical opportunity,” Six4Three waived the right to make a challenge based
on the grounds set forth in its Disqualification Memo. “Parties can waive disqualification by their

conduct when they are aware of the grounds for disqualification, but continue to participate in the proceedings without raising the objection.” *California Judges Benchbook: Civil Procedure before Trial* § 7.14 (Found. for Judicial Educ. 2019). In short, Six4Three did the opposite of making a statement of disqualification “at the earliest practical opportunity.” Instead, it actively participated in litigation before the Court for months, and waived the right to make a disqualification challenge for any of the grounds identified in its Disqualification Memo. Because Six4Three’s statement of objection “is untimely filed, it is appropriate for the trial court to order it stricken.” *Tri Cty. Bank*, 167 Cal. App. 4th at 1337. And it is this Court that should strike Six4Three’s disqualification challenge. *See* Cal. Civ. Proc. Code § 170.4(b) (“if a statement of disqualification is untimely filed . . . *the trial judge against whom it was filed* may order it stricken”) (emphasis added); *Magana*, 22 Cal. App. 5th at 856 (holding that trial judge did not abuse his discretion in denying an untimely disqualification challenge, and that the judge was not powerless to act, because after properly striking the statement of disqualification as untimely, “[t]here was nothing for an independent judge to review”) (citation omitted).

D. Six4Three’s Second Disqualification Statement Presents No Legal Grounds for Disqualification Under Section 170.4(b).

Six4Three’s Second Section 170.3 Disqualification Statement fails for a third independent reason. Under Section 170.4(b), “if a statement of disqualification . . . on its face discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken.” Here, Six4Three has provided no legal grounds for disqualification.

To begin with, under Section 170.3(c)(1), a party seeking to disqualify a judge is required to “file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge.” Six4Three’s second disqualification statement includes a declaration from its lawyer, Matthew J. Olson, that includes only a *single* paragraph that purports to allege facts pertaining to the requested disqualification:

Upon information and belief, and for the reasons stated in the accompanying memorandum of points and authorities in support of this objection, the Hon. V. Raymond Swope is subject to disqualification pursuant to California Code of Civil Procedure § 170.1 because the Hon. V. Raymond Swope has made comments in court over the course of several hearings that objectively create an appearance of bias and prejudgment, that would cause a reasonable observer knowledgeable of the facts to doubt his impartiality, and that impermissibly endanger the public’s perception of

1 a neutral judiciary.

2 Olson Decl. ¶ 3. This statement is insufficient. *First*, Section 170.3(c)(1) requires that the verified
3 disqualification statement “set forth the *facts* constituting the grounds for disqualification of the judge.”
4 (emphasis added). “A statement that merely contains allegations on information and belief or
5 conclusions is insufficient, and the judge against whom the statement is filed may strike it.” CJER, Cal.
6 Benchguide: Disqualification of Judge (Rev. 2010) § 2:25. This paragraph does not allege any specific
7 facts demonstrating that a reasonable observer would believe that the Court is biased or prejudiced
8 against Six4Three. Instead, it contains nothing more than high-level conclusory statements. *See, e.g.,*
9 *Onyx Paving Co. v. Parkcrest Const. Co., Inc.*, No. CIVRS1201949, 2017 WL 4772992, at *1 (Cal.
10 Super. Ct. July 25, 2017). *Second*, the paragraph purports to incorporate by reference Six4Three’s
11 separate—and unauthorized—memorandum of points and authorities. This violates the clear language of
12 Section 170.3(c)(1), which requires that the facts be set forth in a *verified* disqualification statement.
13 Further, setting out the allegations in a separate document again prevents the challenged judge from
14 addressing them in his own written verified answer “admitting or denying any or all of the allegations
15 *contained in the party’s statement.*” Cal. Civ. Proc. Code § 170.3(c)(3) (emphasis added).

16 Six4Three’s statement of disqualification should be stricken for the reasons stated above. But
17 even if the Court is inclined to allow Six4Three to incorporate the Disqualification Memo by reference,
18 Six4Three has still provided no legal grounds for disqualification.²

19 **1. Judge Swope Has Not Prejudged Whether Six4Three and Its Former Legal**
20 **Team Are Guilty of Contempt of Court.**

21 No reasonable observer would conclude that Judge Swope has prejudged whether Six4Three or
22 its former legal team should be held in contempt of court. Rather, the Court has carefully avoided
23 reaching such a conclusion and instead held closely to the documents and sworn declarations of
24 Six4Three’s principal, Mr. Kramer, and Six4Three’s prior legal team of Mr. Godkin, Mr. Kruzer, Mr.

25 _____
26 ² Six4Three’s Disqualification Memo, filed concurrently with its Second Section 170.3 Disqualification
27 Statement, contains numerous factual errors and misrepresentations of the record. In the interest of
28 efficiency, we do not address them all here. However, if the Court does not strike Six4Three’s Second
Section 170.3 Disqualification Statement, Facebook requests leave to submit further briefing regarding
the factual inaccuracies in Six4Three’s Disqualification Memo.

Gross, and Mr. Scaramellino. *See, e.g.*, Hr’g Tr. at 38:10–14 (July 19, 2019) (“I’m not passing judgment. All I’m doing is recounting the information and the facts as they were received by the Court and based upon the papers filed by the parties.”). And in adjudicating Facebook’s multiple requests for discovery, the Court necessarily weighed the evidence Facebook presented to establish, among other things, a prima facie case that the crime-fraud exception should apply. Under Section 170.2(b), the Court “express[ing] a view on a legal or factual issue presented in the proceeding” is explicitly *not* a grounds for disqualification. And mere dissatisfaction with the judge’s rulings is not grounds to disqualify a judge. *See California Judges Benchbook, supra* § 7.36; CJER, Cal. Benchguide: Disqualification of Judge (Rev. 2010) § 2:25.

a. November 30, 2018 Hearing.

Six4Three’s attempt to cherry-pick statements during the November 30, 2018 hearing by the Court to argue that the Court prejudged Six4Three and its former legal team ignores the fact that prior to the hearing both parties submitted extensive briefing, and Six4Three and its former legal team submitted several sworn declarations. In light of the briefing and oral arguments—both of which included clear admissions of violations of the Court’s orders—the Court ordered discovery to commence regarding the disclosure of Facebook’s confidential information. That the Court offered certain views on the legal and factual issues related to Facebook’s request to open discovery is not grounds for disqualification. Cal. Civ. Proc. Code § 170.2(b).

b. March 13 and March 15, 2019 Hearings.

Six4Three’s arguments regarding the Court’s statements in the March 13 and March 15 hearings should also be rejected for failure to provide a legal ground for disqualification. Six4Three simply ignores the context of these hearings and omits any mention of the fact that the Court was considering a noticed motion to open discovery and to compel brought by Facebook, which, among other things, argued that no privilege should attach to any communications between Six4Three and its prior counsel related to the disclosures of Facebook’s confidential information because they fell within the crime-fraud exception. Def.’s Mem. P. & A. in Supp. of Mot. to Open Disc. & to Compel at 11–12 (Jan. 8, 2019).

The Court’s comments during the March 13 and March 15 hearings were in the context of his ruling on Facebook’s motion regarding the crime-fraud exception, and have nothing to do with future

1 sanctions and/or contempt proceedings. For the crime-fraud exception to apply, the moving party must
2 make a prima facie evidentiary showing. In a lengthy order that cites to dozens of documents and sworn
3 declarations, the Court determined that Facebook had made such a showing. March 15 Order at 7–10.

4 **c. The Court's Order That Six4Three Retain Full-Scope Counsel**
5 **Provides No Legal Grounds for Disqualification.**

6 Next, Six4Three makes the facially absurd argument that the Court's order that Six4Three find
7 full-scope counsel to represent it in this litigation is evidence of bias. *First*, Six4Three has known that it
8 needed to retain new counsel in this litigation since at least the November 30, 2018 hearing. Rather than
9 diligently seeking representation, Six4Three delayed and delayed. *Second*, the Court first ordered Mr.
10 Kramer, Six4Three's principal, to obtain counsel to represent it in this litigation in June. Six4Three's
11 claim that it was only given four business days' notice to retain counsel is simply untrue. *Third*,
12 Six4Three's bizarre contention that a corporate plaintiff in a civil case may proceed with only limited-
13 scope counsel has no basis in the California Rules of Court. Because corporate entities cannot represent
14 themselves, a rule allowing them to litigate with only limited-scope counsel would completely upend the
15 civil litigation system. A party could hire counsel for only those issues advantageous to it, while
16 grinding the rest of the case to a halt, which is exactly what Six4Three has done.

17 The two cases that Six4Three cites for the proposition that a corporate entity may proceed in
18 litigation with *only* limited-scope counsel have no bearing on this case. *People v. McKenzie* was a
19 criminal case in which the court made the uncontroversial point that courts should minimize their
20 interference with an individual's desire to defend himself in the criminal context. 34 Cal. 3d 616, 629–
21 30 (1983). This has nothing to do with whether a corporate plaintiff in a civil suit may avoid litigating
22 certain issues by refusing to retain full-scope counsel. *Maxwell v. Superior Court* is even further afield.
23 The issue there was the extent to which a trial court may involuntarily remove deficient counsel in a
24 criminal case. 30 Cal. 3d 606, 613 (1982). This case has simply no application here.

25 **d. News Reports Regarding This Case Provide No Legal Grounds for**
26 **Disqualification.**

27 Finally, Six4Three attempts to shore up its argument by referencing a variety of news reports
28 about this case. This argument also fails to establish any legal grounds for disqualification. Six4Three

claims that “an objective appearance of bias is established” because certain “major media outlets” reported that this Court was “skeptical” and “expressed amazement” at the arguments and evidence put forward by Six4Three and its legal team. Disqual. Mem. at 17. Nonsense. Virtually all journalistic accounts of courtroom proceedings make an attempt to determine how a judge might rule in pending or future proceedings. If reports that a judge was critical of one party or another during oral argument are sufficient to demonstrate an appearance of bias, no judge could withstand scrutiny.

2. The Primary Case Cited by Six4Three Does Not Establish Bias or Prejudice.

In re Martin is readily distinguishable from the facts here. In that case, the trial court judge found the petitioner in contempt of court without notice or an originating affidavit, and sentenced him to be imprisoned in the county jail for forty-eight hours. *In re Martin*, 71 Cal. App. 3d 472, 476–77 (1977). Following a request for rehearing, the judge vacated that sentence and initiated a properly noticed contempt proceeding. *Id.* at 477. During the hearing on petitioner’s request for a rehearing, the judge (1) made several statements indicating that he believed he had been correct in finding the petitioner guilty of contempt in the first hearing, and (2) offered statements based on his own recollection, thereby becoming, in effect, a factual witness against the petitioner. Here, there has been no finding of contempt by the Court, either formally or informally. And as discussed above, the Court’s finding that Facebook presented a prima facie case that the crime-fraud exception applies in its March 15 Order is entirely appropriate and cannot be used as a basis to allege bias or prejudice.³

³ Six4Three additionally argues that the Court demonstrated bias because it has not sanctioned Facebook for events that occurred last year, notwithstanding the fact that Six4Three never moved for sanctions. Six4Three also misstates California law when it claims that Facebook’s “submission [of settlement communications] was highly improper under the Rules of Evidence and Rules of Professional Conduct.” Disqual. Mem. at 15:12–13. Section 1152 of the California Rules of Evidence only makes offers of compromise “inadmissible to prove [a person’s] liability for the loss or damage [claimed by another.]” Cal. Evid. Code § 1152(a). Facebook never proffered the communication for such a purpose. *See Zhou v. Unisource Worldwide*, 157 Cal. App. 4th 1471, 1478 (2007) (holding that a trial court erred in excluding settlement letters where those letters “were not offered to prove the invalidity of the claim under negotiation”); *and cf.* Weil & Brown, *California Practice Guide: Civil Procedure before Trial* § 8:107 (Rutter Grp. 2019)(“[S]ettlement offers and negotiations may be relevant to the subject matter for *other purposes*[.]”).

1 **IV. THE COURT SHOULD ISSUE AN ORDER TO SHOW CAUSE WHY SANCTIONS**
2 **SHOULD NOT ISSUE UNDER SECTION 128.7.**

3 Section 128.7 of the California Code of Civil Procedure provides for sanctions against a party or
4 an attorney for presenting papers for an improper purpose, such as to cause unnecessary delay. *See*
5 *generally* Cal. Civ. Proc. Code § 128.7; *California Judges Benchbook, supra* § 17.8. The Court itself
6 may initiate sanctions proceedings under this section by “enter[ing] an order describing the specific
7 conduct that appears to violate [section 128.7] subdivision (b) and directing an attorney, law firm, or
8 party to show cause why it has not violated [section 128.7] subdivision (b), unless, within 21 days of
9 service of the order to show cause, the challenged paper, claim, defense, contention, allegation, or denial
10 is withdrawn or appropriately corrected.” Cal. Civ. Proc. Code § 128.7(c)(2). Here, there is ample
11 reason for the Court to issue an order to show cause why Section 128.7 sanctions should not issue against
12 Six4Three and Macdonald Fernandez. The Second Disqualification Statement devised, prepared, and
13 filed by those entities is legally frivolous and filed for an improper purpose.

14 **A. Six4Three’s Challenge Is Legally Frivolous.**

15 Under Section 128.7(b)(2), a pleading is sanctionable if it “[c]ontains a claim, defense, or other
16 legal contention that is not warranted by existing law or by a nonfrivolous argument for the extension,
17 modification, or reversal of existing law[.]” *California Judges Benchbook, supra* § 17.8.

18 Six4Three’s challenge is replete with positions that contravene existing law. Facebook above
19 explained why the disqualification provisions of California’s Code of Civil Procedure bar Six4Three’s
20 challenge even before this Court gets to their “merits”—or lack thereof. **First**, Six4Three already filed
21 one statement of disqualification on July 12, 2019. Under the clear language of Civil Procedure Code
22 Section 170.4(c)(3), Six4Three may not now file another. Six4Three’s Second Disqualification
23 Statement does not even **attempt** to identify authority for Six4Three’s serial Section 170.3
24 disqualification statements, let alone for an extension of law to Six4Three’s circumstances. **Second**, even
25 if Six4Three had not already filed a Section 170.3 disqualification statement, its second statement is
26 untimely under Section 170.3(c)(1). **All** of the conduct on which Six4Three’s Second Disqualification
27 Statement relies predates that challenge by months. *See* Cal. Civ. Proc. Code § 170.3(c)(1) (“The
28 statement shall be presented at the **earliest practicable opportunity** after discovery of the facts

1 constituting the ground for disqualification.”) (emphasis added). **Third**, Six4Three’s Second
2 Disqualification Statement also fails to provide any legal grounds for disqualification. Six4Three’s
3 second challenge amounts to nothing more than a disagreement with this Court’s rulings following
4 extensive briefing and hearings.

5 **B. Six4Three’s Cause Challenge Was Presented for an Improper Purpose—to Create**
6 **Unnecessary Delay.**

7 Like any other verified pleading, “a statement of disqualification under sections 170.1
8 and 170.3 must not be presented primarily for an improper purpose, such as to cause
9 unnecessary delay[.]” *Magana*, 22 Cal. App. 5th at 864–65; *see also California Judges Benchbook*,
10 *supra* § 17.8 (under section 128.7(b)(1), a pleading is sanctionable if it “[i]s presented primarily for an
11 improper purpose, such as to . . . cause unnecessary delay[.]”).

12 That Six4Three had such an improper purpose is the only possible inference from Six4Three’s
13 conduct in this action: As early as November 30, 2018, Six4Three knew that it would have to retain new
14 lawyers to proceed with this lawsuit. On that date, Six4Three’s former lawyers at Birnbaum & Godkin
15 and Gross & Klein told the Court that they planned to withdraw, which would leave Six4Three
16 unrepresented. *See Hr’g Tr.* at 19:6–21, 37:9–11 (Nov. 30, 2018). But rather than seek new counsel in
17 good faith, Six4Three’s principal used the next two months to contact a mere seven law firms. *See*
18 *Kramer Decl. re Mot. to be Relieved as Counsel* (Jan. 24, 2019). Among the firms that Six4Three’s
19 principal seems to have contacted was Fenwick & West, *see id.* ¶ 12 (referencing a firm “in Mountain
20 View with other 350 attorneys”), a firm that is so obviously conflicted based on its past and current
21 representation of Facebook as to cast doubt on the sincerity of Six4Three’s early efforts.

22 After Six4Three’s former lawyers withdrew in April 2019, this Court ordered Six4Three to retain
23 counsel by May 31, 2019. *See Order Resetting CMC to June 7, 2019* (May 31, 2019). In response,
24 Six4Three’s principal submitted an vague declaration stating that he had “contact[ed] . . . dozens of law
25 firms”—but he declined to identify them, by name or location. *See Decl. of Theodore Kramer re*
26 *Retention of Counsel* ¶ 3 (May 31, 2019). Notwithstanding the fact that Facebook had served detailed
27 discovery requests on Six4Three and its legal team, Six4Three’s principal asserted that the “above-
28 mentioned firms” declined to represent Six4Three “until they know what . . . associated discovery, if any,

1 they will be defending[.].” *Id.* ¶ 6. Six4Three then asked for another ninety days to retain counsel. *Id.*
2 ¶ 26. The Court rejected that request, finding that Six4Three’s principal “had been dilatory in retaining
3 counsel” and ordering that Six4Three do so by June 28, 2019, with a confirming declaration to follow by
4 July 1, 2019. June 19 Counsel Retention Order at 1.

5 On July 1, 2019, Six4Three filed a three-paragraph declaration that stated cryptically that
6 Six4Three had “executed a retainer agreement with a law firm . . . for representation of Plaintiff in the
7 present matter.” Decl. of Kramer re: Counsel Retention Order ¶ 2 (July 1, 2019). The firm would
8 “promptly file a Notice of Appearance,” Kramer said. *Id.* ¶ 3. A day later, Facebook received a “Notice
9 of Limited Scope Representation” from the law firm of Macdonald Fernandez, which said that it would
10 represent Six4Three if Facebook sought sanctions and if a case management conference proceeded on
11 July 19, 2019. *See* Notice of Limited Scope Representation at 1 (July 2, 2019). But Macdonald
12 Fernandez also served that day a peremptory challenge to this Court under Section 170.6. *See* Request
13 for Peremptory Challenge (filed July 3, 2019). After this Court rejected that challenge on July 9,
14 Macdonald Fernandez unsuccessfully sought writ review from the First District Court of Appeal, and,
15 ultimately, from the California Supreme Court. *See* Order Denying Petition (Cal. Ct. App. July 19,
16 2019); Order Denying Petition (Cal. Aug. 9, 2019).

17 Finally, on August 6, 2019—four days after the California Supreme Court’s decision denying the
18 petition for review and on the eve of this Court’s August 7, 2019 case management conference—
19 Six4Three filed its Second Disqualification Statement. This pattern of deliberate foot-dragging
20 demonstrates that Six4Three’s latest challenge amounts to nothing more than a bad-faith delay tactic.

21 **V. CONCLUSION**

22 For the foregoing reasons, Facebook requests that this Court strike Six4Three’s Second
23 Disqualification Statement, and issue an order to show cause why Section 128.7 sanctions should not
24 issue against Six4Three and Macdonald Fernandez.

1 Dated: August 8, 2019

DURIE TANGRI LLP

2
3 By: _____



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PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On August 8, 2019, I served the following documents in the manner described below:

FACEBOOK, INC.'S OPPOSITION TO SIX4THREE, LLC'S STATEMENT OF DISQUALIFICATION

- ☒ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.
- ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 8, 2019, at San Francisco, California.